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No. 10-686

In The
Supreme Court of the United States

Human Life of Washington, Inc., *Petitioner*

v.

Chair Bill Brumsickle et al., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Reply to Brief in Opposition

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Reasons to Grant the Petition

Washington demonstrates why campaign-finance jurisprudence is not working and the petition should be granted. Like the decision below, Washington would evade this Court's the-major-purpose test for political-committee ("PAC") status by conflating (1) simple, event-driven reports with onerous PAC-style burdens; (2) scrutiny appropriate to simple disclosure with scrutiny required for onerous PAC-style burdens; and (3) express advocacy with issue advocacy. *See* Part I. It disputes that the First Amendment requires brightline definitions to protect core political speech. *See Part II.*

I. When PAC-Status May Be Imposed Is an Important Federal Question With Conflicting Decisions.

HLW established that Washington's scheme for imposing PAC-status conflicts with decisions of this and other courts. Pet. 14-22. Washington admits it imposes PAC-status based on *a* primary purpose, not *the* major purpose, of an organization, both as to its "receiver of contributions prong" and "expenditure prong. Opp'n 2-3, 18.[1] But it alleges no conflict with decisions of this and other courts. Opp'n 18-21. It is wrong.

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[1] Washington says HLW did not challenge the contributions prong. Opp'n 18 n.8. Washington is wrong. *See, e.g.*, Compl. 10 ("HLW challenges Washington's manner of imposing PAC status . . . , which . . . involves . . . Washington's 'receiver of contributions' test" (¶ 42).); Br. of Appellant 2 (Issue "1. Whether Washington's 'political committee' definition . . . and its implementing . . . 'receiver of contributions' test[], are unconstitutional . . . ."). HLW argued that Washington may not impose PAC-status absent *Buckley*'s "the major purpose," *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), in *any* way.

A. The Decision Below and Washington's PAC-Status Scheme Conflict with this Court's "the Major Purpose" Test.

This Court's the-major-purpose test for determining whether PAC-status may be imposed is foundational to campaign-finance jurisprudence. *See* Pet. 14-19.

Washington dismisses the test in *Buckley*, 424 U.S. at 79, as merely a "narrowing construction . . . [of] the specific statutory definition of '*political committee*,'" not stating "an absolute limit on when a state may seek *disclosure* by an organization involved in support of or opposition to a ballot measure." Opp'n 19 (emphases added). Washington makes two errors.

First, Washington switches between simple *disclosure* and *PAC-status* as if they were interchangeable. They are not. In fact, *Buckley* itself was dealing with two types of disclosure—one for a "political committee" and another for "a group other than a 'political committee'"—when it created its "the major purpose" test. *Id.* at 79-80. *Buckley*'s the-major-purpose test and the express-advocacy test both protected issue advocacy and issue-advocacy groups, like HLW, in the disclosure context. *Id.* So just because government may require *disclosure* of an entity does not mean that it may impose onerous[2] *PAC-style* disclosure. Washington's

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[2] Washington claims its PAC-style burdens are "modest," not "onerous," "because no evidence supports HLW." Opp'n 17 n.7. Washington is wrong. They are "onerous" as a matter of law. *See Citizens United v. FEC*, 130 S.Ct. 876, 898 (2010) ("*Citizens*") ("onerous"); *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 477 n.9 (2007) (Roberts, C.J., joined by Alito, J.) ("*WRTL-II*") ("PACs impose well-documented and onerous burdens, particularly on small nonprofits " (citing

conflation permeates its argument.

Second, *Buckley*'s "narrowing construction" was based on constitutional concerns and is directly relevant to the *current* political-committee definitions in both federal and Washington statutes. *Buckley* was construing a *disclosure* requirement for "expenditures" defined with vague "'for the purpose of . . . influencing' an election" language. 424 U.S. at 79 (citation omitted). It first considered its application to "political committees," defined as "'any . . . group of persons which receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000." *Id.* at 70 (citation omitted). That is nearly identical to the current federal definition, *see* 2 U.S.C. 431(4), and Washington's definition (but for Washington's missing $1,000 trigger), *see* Wash. Rev. Code 42.17.020(39). The definitions being essentially identical, Washington may not dismiss *Buckley*'s the-major-purpose test as being for an irrelevant statute. The problem that *Buckley* identified was that "'political committee' is defined only in terms of amount of annual 'contributions' and 'expenditures,' and could be interpreted to reach groups engaged purely in issue discussion." 424 U.S. at 79 (footnote omitted). The same problem exists with Washington's statute and its application to HLW's planned issue advocacy. *Buckley* does not say that a group must do *only* issue advocacy to avoid imposed PAC-status. Rather, *Buckley* looks to "the major purpose of nominating or electing candidates." *Id.* at 79. Given *Buckley*'s limitations on what

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FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 253-55 (1986) ("*MCFL*") (plurality opinion)). *See also* Pet. 19 (burdens deemed "onerous" in *Citizens* nearly identical to PAC burdens Washington imposes).

speech is constitutionally regulable, major purpose would be determined based only on independent expenditures for "express advocacy," *id.* at 43-44, 80, and contributions to candidates, both considered in relation to a group's total annual spending. Thus, Washington has failed to distinguish *Buckley* and its controlling "the major purpose" test.

Washington tries to distinguish this Court's reaffirmation in *MCFL*, 479 U.S. 238, of *Buckley*'s test. Opp'n 19. As it does throughout its brief, Washington dismisses the *analysis* as irrelevant because the case was distinguishable on some *factual* basis. But when this Court said the following, it surely did not expect its analysis could be brushed aside as irrelevant to PAC-status:

> In *Buckley* . . . , this Court said that an entity subject to regulation as a "political committee" under the Act is one that is either "under the control of a candidate or *the major purpose* of which is the nomination or election of a candidate." . . . . It is undisputed on this record that MCFL fits neither of these descriptions. Its central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates.

MCFL, 249 U.S. at 252 n.6 (plurality opinion) (citations omitted) (emphasis added). Nor did this Court likely think the following irrelevant to the permissible PAC-status standard:

> Should MCFL's independent spending become so extensive that *the organization's major purpose* may be regarded as campaign activity, the corporation would be classified as a political committee. See *Buckley*, 424 U.S., at 79. As

> such, it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns.

MCFL, 249 U.S. at 262 (emphasis added). *See also id.* at 252 ("major purpose" test), 253 (plurality opinion) (same).

McConnell v. FEC, relied on this Court's "the major purpose" test as part of its analysis. 540 U.S. 93, 170 n.64 (2003), thereby implicitly reaffirming it. Washington says the decision below does not conflict with *McConnell* on this point, Opp'n 18, but fails to argue how this is so. *See* Opp'n 20 (turning to *McConnell* but changing the topic).

Washington's central argument is that everything changed with *Citizens*, 130 S.Ct. 876, and *Doe v. Reed*, 130 S.Ct. 2811 (2010). Opp'n 14-15, 26. But in neither case was *Buckley*'s the-major-purpose test at issue, part of the analysis, nor even mentioned. They could not have altered the test.

Moreover, *Citizens* expressly rejected a "[multi]-factor, balancing test" implementing its "objective" test, *Citizens*, 130 S.Ct. at 895, because such "onerous restrictions . . . function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws . . . that the First Amendment was drawn to prohibit," *id.* at 895-96. That forbidden approach is how Washington determines PAC-status. Opp'n 2-3 ("non-exhaustive list of analytical tools").

The only way that Washington can make the argument that *Citizens* somehow overruled these cases is by attempting the sleight-of-hand substitution of mere *disclosure* for *PAC-status*. By conflating them, Wash-

ington tries to force onerous PAC-status into the analysis of *Citizens*, which imposed exacting scrutiny on simple, event-driven electioneering-communication reporting. 130 S.Ct. at 913-14. *See also* Pet. 29-31. But PAC-status differs in kind from electioneering-communication reporting because it onerously regulates a *group*, based on its *nature*, not just some of its *activities*. And in considering whether the PAC-option adequately protected the First Amendment rights of corporations, *apart from the corporate prohibition*, *Citizens* applied strict scrutiny, 130 S.Ct. at 898, just as *MCFL*, 479 U.S. at 256, 260, and *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 658 (1990), *overruled on other grounds*, *Citizens*, 130 S.Ct. at 913, applied strict scrutiny to imposed PAC status. *See* Pet. 26-32. *Citizens* only applied "exacting scrutiny" to electioneering-communication reporting. 130 S.Ct. at 913-14.

Washington attempts to draw the line for strict scrutiny at provisions that prohibit speech. Opp'n 15. But while the cases just discussed did involve corporate prohibitions on independent expenditures, the application of strict scrutiny did not turn on that. *Buckley* created its the-major-purpose test in the context of analyzing "expenditure" *disclosure*, not a corporate prohibition, and determined, without stating the level of scrutiny, that PAC-status could not constitutionally be imposed on groups engaged in issue advocacy who lacked "the major purpose of nominating or electing candidates." 424 U.S. at 79. So under *Buckley*, whatever the level of scrutiny, PAC status cannot be imposed on issue-advocacy groups like HLW.

MCFL dealt with corporations that were *not* prohibited from engaging in express-advocacy independent

expenditures because they did not fit the rationale for the corporate prohibition. *See* 479 U.S. at 263-64. The FEC argued that *if the corporate prohibition were inapplicable*, PAC-style regulation was necessary for *MCFL*-corporations to prevent "massive undisclosed political spending." *Id.* at 262. This Court required a "compelling state interest" in its analysis of the constitutionality of imposing *PAC-status* on such groups, *see id.* at 256, 260, *in addition to* its analysis of the *prohibition* itself, *see id.* at 262. And this Court required the less-restrictive means (a strict-scrutiny requirement) of simple, one-time activity reports instead of PAC-style reports to meet the state's *disclosure* needs: "The state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act." *Id.*

And *Austin* directly contradicts Washington's attempt to restrict strict scrutiny to prohibitions. This Court specifically noted that it was dealing with the PAC-style burdens, *not* the prohibition, when it required strict scrutiny: "Although these requirements *do not stifle corporate speech entirely*, they do *burden* expressive activity. See MCFL, 479 U.S., at 252 (plurality opinion); id., at 266 (O'CONNOR, J.). Thus, they must be justified by a compelling state interest." *Austin*, 494 U.S. at 658 (emphases added).

This Court in *Davis v. FEC* held that even "exacting scrutiny" requires higher justification where burdens are higher. 128 S.Ct. 2759, 2775 (2008). Washington fails to even mention this case, instead creating the strawman argument that HLW proposes "a special standard based on the term 'onerous.'" Opp'n 17. Washington's argument that no court "uses an 'onerous'

standard," *id.*, fails to answer *Davis* and thus requires no further answer. *See* Pet. 30.

In sum, Washington fails to show that its PAC-status scheme and the decision below do not conflict with this Court's holdings and that strict scrutiny (or at least high exacting scrutiny) applies to imposed PAC-status.

B. The Decision Below and Washington's PAC-Status Scheme Conflict with Other Courts' Holdings.

Buckley's the-major-purpose test was clearly recognized by other courts and the Federal Election Commission. Pet. 18-22.[3]

The Fourth Circuit expressly held that this Court requires *the* major purpose, not *a* major purpose in its test for imposing PAC status. *See North Carolina Right to Life v. Leake*, 525 F.3d 274, 287-89 (4th Cir. 2008); Pet. 20. The opinion below expressly recognized that it created a circuit split with the Fourth Circuit by holding that "a primary purpose" was enough. App. 34a; Pet. 20 n.19. But Washington claims no "genuine conflict" exists. Opp'n 26.

First, Washington argues no real conflict because "*Leake* pre-dates . . . *Citizens*" and the Ninth Circuit found *Leake* unpersuasive for that reason. Opp'n 26. That leaves the conflict. As shown above, neither

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[3] Washington says the FEC does not require *the* major purpose. Opp'n 19 n.9. Washington is wrong. *See* FEC, "Political Committee Status," 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007) ("Not only must the organization have raised or spent $1000 in contributions or expenditures, but it must additionally have *the* major purpose of engaging in federal campaign activity." (emphasis added)).

Citizens nor *Doe* alters this Court's the-major-purpose test or its application of strict scrutiny to imposed PAC status and burdens. *See supra* at 5.

Second, Washington argues that *Leake* said that Washington's scheme was not flawed. Opp'n 26. But whatever the *Fourth Circuit* said about *Washington's scheme* (not about the decision below) cannot eliminate the clear conflict that the Ninth Circuit *acknowledged*. And simply consulting *Leake* reveals that *Leake*'s comment had nothing to do with this Court's the-major-purpose test because it was discussing vague definitions regulating speech. *See* 525 F.3d at 299.

Third, Washington argues that *Leake* relied on the absence of clear guidance on "'how to comply with the law.'" Opp'n 27 (quoting *Leake*, 525 F.3d at 289). And Washington argues that there are "no difficulties in complying with Washington's definition or its modest disclosure requirements." Opp'n 27. But *Leake* said that the vagueness of North Carolina's "a major purpose" test was equivalent to "'handing out speeding tickets without telling anyone the speed limit.'" 525 F.3d at 290 (citation omitted). Washington's *a*-primary-purpose test does the same. Any guidance Washington claims is not in its statutes and regulations, where it must be. And the PDC cannot even give formal, binding advisory opinions, *see* Opp'n 5 ("informal advisory opinions"), which in any event cannot alter the inherent vagueness of an *a*-primary-purpose test.

Washington has failed to eliminate the "genuine conflict" between the decision below and the Fourth Circuit on whether imposed PAC status must be based on this Court's *the*-major-purpose test, which conflict the Ninth Circuit itself acknowledged.

C. Washington's Efforts to Brand HLW a PAC Demonstrate Case Conflicts and Chill.

The decision below conflicts with this and other courts on how to determine "major purpose." The decisions of this and other courts say it is done by examining what an entity's organic documents create it to be and how much of its annual budget is spent on express-advocacy independent expenditures and regulable contributions. Pet. 22-26. The opinion below conflicted with this permissible scope by considering non-cognizable activity in an attempt to brand HLW a PAC. Pet. 15, 22.

Washington now compounds this error, saying it doesn't matter that the Ninth Circuit relied on a single 2008 email—which wouldn't even be deemed an "expenditure" under Washington's scheme—because it was "part of a larger record showing that HLW's primary purpose in 2008 would be *to expend funds to oppose I-1000*." Opp'n 21 n.11 (emphasis added). But the portions of the decision below to which Washington points do precisely what HLW said they do in trying to brand HLW a PAC, i.e., rely on what happened in *1991*, what HLW's *PAC* did, and that *single unregulated email* as the only example of express advocacy against I-1000. *See* Pet. 15, 22. This shows the deep chill of Washington's scheme and the way it is enforced and what the Ninth Circuit has permitted.

Fundamental to both the Ninth Circuit's and Washington's error is the necessity of distinguish[ing] issue advocacy from express advocacy. What HLW was chilled from doing was an *issue-advocacy* campaign against physician-assisted suicide. What it carefully avoided was a major purpose of *expressly advocating* against I-1000. Yet Washington and the decision below

constantly conflated them, e.g., the issue activity would equate with "*oppos[ing] I-1000*." Opp'n 21 n.11 (emphasis added). While issue advocacy may require disclosure (if a state passes a proper electioneering communication statute that would capture issue advocacy near initiative votes, which Washington has not), it should not count toward PAC status precisely because it is known to sweep in issue advocacy. *See WRTL-II*, 551 U.S. at 470 (principal opinion). Under the federal scheme, electioneering communications were not even included in the "expenditure" definition, *see* 2 U.S.C. 431(9), so they cannot be an "expenditure" that triggers PAC status. *See* 2 U.S.C. 431(4) (PAC definition). But *even if* all the issue advocacy that HLW wanted to do were counted toward PAC status, it still would not be HLW's major purpose because it would not exceed 50% (nor even 20%) of HLW's approximately $180,000 budget for 2008. Pet. 7.[4]

The decision below conflicts with decisions of this and other courts. And Washington's defense shows the chill on issue advocacy from such an ad-hoc approach.

II. Whether Speech Regulation Requires Brightline Standards Is an Important Federal Question with Conflicting Decisions.

HLW demonstrated that the decision below conflicts with decisions of this and other courts that require brightline standards for regulating core political speech. Pet. 32-34. Two Washington responses merit reply.

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[4] Washington says issue-advocacy expenditures might have reached $50,000. Opp'n 7. This is wrong but makes no difference because that would still not be HLW's major purpose.

First, Washington asserts that HLW insists that only magic-words express advocacy may be subjected to disclosure and notes that *Citizens* allowed disclosure as to all electioneering communications. Opp'n 23-24. But HLW's point is that *Buckley* required *brightline* tests for disclosure and that the electioneering-communication definition is bright, unlike Washington's vague and overbroad definitions.

Second, HLW said the decision below conflicts with *Leake*, which held that only two definitions of regulable contributions "str[ike the right] balance between the legislature's authority to regulate elections and the public's fundamental First Amendment right to engage in political speech," i.e., express-advocacy communications and federally defined electioneering communications. 525 F.3d at 284. Washington merely disputes without refuting this. Opp'n 27 n.13.[5]

The decision below conflicts with decisions of this and other courts. And Washington's defense shows the chill on issue advocacy from vague and overbroad definitions.

Conclusion

Granting the petition will allow correction on these issues of great importance to protecting core political speech. Otherwise, states will continue chilling speech by imposing onerous PAC-style burdens on groups not rightly PACs and regulating core political speech with vague and overbroad laws.

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[5] Washington says the provision challenged in Question 4 requires no reporting. Opp'n 5 n.3, 22 n.12. The regulation speaks for itself. Pet. 123a ("shall report").

Respectfully submitted,

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